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The Exclusionary Rule and Probation Revocation Proceedings (Dulin v. State)

THE EXCLUSIONARY RULE AND PROBATION REVOCATION PROCEEDINGS

*Dulin v. State**

INTRODUCTION

Probation is a discretionary tool of a court whereby a defendant who has pleaded guilty or has been convicted is released into the community under the supervision of a probation officer.[1] In addition to supervision, the probationer is subject to a number of conditions or rules imposed by the court.[2] Whenever there is a violation of the probation conditions, the court may conduct a hearing and, if warranted, place the probationer in prison.[3] Occasionally at these hearings the constitutional rights of the probationer conflict with the state's interests in prosecuting criminals. To protect the rights of the probationer adequately the courts must balance these conflicting interests. In the recent Indiana decision of *Dulin v. State*,[4] the Indiana Court of Appeals weighed such interests in deciding whether illegally seized evidence is admissible at a probation revocation hearing. In holding that the exclusionary rule did not apply to probation revocation proceedings, the *Dulin* court stated:

> [I]n deciding whether to extend the exclusionary rule to probation revocation proceedings, the court must weigh

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* ___ Ind. App. ___ , 346 N.E.2d 746 (1976).

1. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 27-34 (1967) [hereinafter cited as TASK FORCE].

The distinction between probation and parole is primarily one of procedure rather than one of substance. Probation is granted by the trial judge and is therefore a judicial function. Parole is granted at the discretion of a Parole Board and is given only after the defendant has served part of his sentence. This separation of powers, judicial from administrative, has been overemphasized in the past, for the results of the two procedures are substantially the same. The purpose of probation and parole is the rehabilitation of the offender. In addition, both rely upon conditions for supervision for release and upon possible revocation to assure that the offender does not commit additional offenses. *See* Morrissey v. Brewer, 408 U.S. 471 (1972); TASK FORCE at 60-71.

The distinction between parole and probation is more thoroughly treated in Cohen, *Due Process, Equal Protection and State Parole Revocation Proceedings*, 42 U. COLO. L. REV. 197, 225-26 (1970).

For Indiana's definition of probation see IND. CODE § 35-7-1-1 (1973).

2. IND. CODE § 35-7-2-1 (1973).

3. *Id.*

4. ___ Ind. App. ___ , 346 N.E.2d 746 (1976) [hereinafter cited as Dulin].

> the benefits that may accrue from such application of the rule against the needs of any potential injury to the probation system.[5]

It is this balancing approach, as applied to the exclusionary rule in probation revocation hearings, which will be the focus of this commentary. The balancing approach requires that courts carefully weigh an individual's right to be secure in his person and the state's interest in protecting against violations of the law.[6] This commentary will consider the applicability of the exclusionary rule to probation revocation proceedings in light of these conflicting considerations. Attention will be paid to possible instances of police harassment and the effect of such harassment on the admissibility of the illegally obtained evidence.[7]

THE FACTUAL CONTEXT

In January 1975, defendant Dulin pleaded guilty to possession of marijuana[8] and was subsequently placed on probation for one year.[9] His probation was subject to a number of conditions, including the stipulation that he was,

> not to use marijuana, hashish or any substance which may be defined as a controlled substance or a dangerous drug under [Indiana law during the time of his] probation except upon the prescription of a qualified physician.[10]

The day after Dulin was placed on probation, the police received information that Dulin had marijuana in his automobile.[11] Pursuant to a search warrant obtained on the basis of this information, the police conducted a search of Dulin's automobile and discovered marijuana. He was consequently arrested for possession of a controlled substance, but the charges were dismissed and he was never brought to trial.[12]

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5. *Id.* at 750, citing with approval, United States v. Rushlow, 385 F. Supp. 795, 797 (S.D. Cal. 1974).

6. Morrissey v. Brewer, 408 U.S. 471 (1972). *See also* United States *ex rel.* Lombardino v. Heyd, 318 F. Supp. 648, 650 (E.D. La. 1970).

7. Dulin at 750-51.

8. A second charge of possession of a smoking apparatus was dismissed. *Id.* at 747.

9. At sentencing, the trial judge suspended execution of a one-year term. *Id.*

10. *Id.*

11. It cannot be determined whether Dulin's probationary status was known to the arresting officer.

12. *Id.* at 748. No reason for the dismissal was offered by the court.

As a result of the search and seizure, the trial court ordered Dulin to appear at a probation revocation hearing. At the hearing Dulin objected to the evidence seized under the search warrant; however, the court denied his request for a preliminary hearing to test the validity of the warrant. The trial court held that Dulin had violated probation condition Nine, which stated:

> Defendant is to conduct himself in such a manner that no one has any occasion to question whether or not he has violated the law. That means that if anyone has sufficient grounds to think that he should be arrested or charged, that may be a violation of the terms and conditions of probation, and so much as a traffic ticket could be enough to revoke the probation. This goes not so much to the act, but to the mental attitude of respect for the law and ability to abide by the law.[13]

Consequently, Dulin's probation was revoked and he was committed for the remainder of his one-year sentence.

On appeal, the Indiana Court of Appeals assumed *arguendo* that the search warrant was defective and hence that the search and seizure was improper.[14] The court went on to hold that evidence obtained in the search and seizure need not be suppressed in a probation revocation hearing,[15] the only exception being in cases of "police harassment." In such cases the exclusionary rule should be applied.[16]

The court of appeals also found condition Nine to be unreasonably vague and consequently "inapplicable."[17] However, the court refused to reverse on this ground, noting that there was sufficient evidence to establish that the probationer had violated the stipulation regarding a controlled substance. Because the trial court reached the correct result, the appellate court found no need to remand the case for further proceedings; the judgment of revocation was affirmed.[18]

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13. *Id.* at 748-49.
14. *Id.* at 750.
15. *Id.* at 753.
16. *Id.* at 750.
17. The Court of Appeals noted that IND. CODE § 35-7-2-1 (1973), gave the trial judge broad discretion to impose conditions which he may deem important. However, the Court of Appeals noted further that the conditions must be stated with a certain degree of specificity. Otherwise, there would be no way to determine whether the conditions had been violated. Dulin at 753-54.
18. *Id.* at 754.

APPLICATION OF THE EXCLUSIONARY RULE

The United States Supreme Court first announced the exclusionary rule in *Weeks v. United States.*[19] In *Weeks* the Court stated that evidence obtained in violation of the fourth amendment must be excluded from the prosecution's case-in-chief.[20] The Court noted that if the evidence could be used,

> the protection of the fourth amendment declaring . . . [the] right to be secure against such searches and seizures is of no value, and . . . might as well be stricken from the Constitution.[21]

In subsequent decisions the Court clearly indicated that the principal purpose of the exclusionary rule is to protect individual rights by removing the incentive to violate them.[22] Whether the exclusionary rule has been applied to a particular proceeding has continued to depend upon the relationship of the proceeding to the policies and interests underlying the rule.

In *Alderman v. United States,*[23] the United States Supreme Court considered the conflicting interests of the state and the individual. At issue was the determination of whether illegally obtained evidence should be excluded from criminal trials regardless of whether the defendant has standing to object to the search. Noting that there was no precedent to hold that "anything which deters illegal searches is thereby commanded by the fourth amendment,"[24] the Court proceeded to balance the competing interests. Reasoning that the additional benefits of extending the exclusionary rule to other defendants would not justify "further encroachment upon the public interest,"[25] the Court refused to extend the exclusionary rule.

A few years later, the Court was confronted with the propriety of invoking the exclusionary rule in a grand jury proceeding.[26] In

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19. Weeks v. United States, 232 U.S. 383 (1914). The *Weeks* exclusionary rule was expressly limited to federal cases in which the federal officers had obtained the evidence illegally. *Id.* at 398. It was not until *Mapp v. Ohio*, 367 U.S. 643 (1961), that the exclusionary rule of *Weeks* was made binding on the states.

20. Weeks v. United States, 232 U.S. 383, 398 (1914).

21. *Id.* at 394.

22. Elkins v. United States, 264 U.S. 206, 217 (1960). *See also* Wolf v. Colorado, 338 U.S. 25 (1949); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Weeks v. United States, 232 U.S. 383 (1914). *See generally* Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 937 (1965).

23. 394 U.S. 165 (1969).

24. *Id.* at 174.

25. *Id.* at 175.

26. 414 U.S. 338 (1974).

United States v. Calandra,[27] the Court held that a witness called before a grand jury may not refuse to answer questions on the grounds that such questions are based on evidence obtained from an unlawful search and seizure.[28] Mr. Justice Powell, speaking for the majority, stated that the exclusionary rule is a judicially created remedy designed to protect fourth amendment rights through its deterrent effect. He pointed out that "the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in *all* proceedings or against *all* persons."[29] Rather, the application of the rule has been limited to those proceedings where its remedial objectives are thought most "efficaciously served."[30] The Court noted further that any deterrent effect to be derived from the application of the exclusionary rule to grand jury proceedings would be "uncertain at best."[31] Consequently, the Court refused to apply the exclusionary rule in grand jury proceedings because such application would not provide any additional deterrent effect. The Court, therefore, was cognizant of the need for a balance between the function of the grand jury and "the benefits to be derived from the proposed extension of the exclusionary rule."[32]

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27. *Id.*
28. *Id.*
29. *Id.* at 348 (emphasis added).
30. *Id.*
31. *Id.* at 351.
32. *Id.* at 350.

The United States Supreme Court has refused to apply the exclusionary rule where the prosecution has offered the illegally obtained evidence solely for impeachment purposes. In *Walden v. United States*, 347 U.S. 62 (1954), heroin was obtained from the defendant as a result of an illegal search and seizure. At the defendant's trial the heroin was suppressed. Later in the trial, the defendant asserted on direct examination that he had never possessed any narcotics. The Court held that such evidence could be used solely for impeachment purposes. *Harris v. New York*, 401 U.S. 222, 224 (1971), noted that the statements allegedly made by the petitioner were inadmissible in the prosecution's case-in-chief. However, the Court noted that,

> [i]t does not follow from Miranda that the evidence inadmissible against an accused in the prosecution's case-in-chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards.

Id. at 224. Consequently, the Court held that illegally obtained evidence could be used for impeachment purposes. *See also* Oregon v. Hoss, 420 U.S. 714 (1975); United States v. Curry, 358 F.2d 904 (2d Cir. 1967); Note, *The Impeachment Exception: Decline of the Exclusionary Rule?*, 8 IND. L. REV. 865 (1975).

Illegally obtained evidence may also be used at sentencing. *United States v. Shipani*, 435 F.2d 26 (2d Cir. 1970), expressly held that,

> [w]here illegally seized evidence is reliable and it is clear . . . that it was not gathered for the express purpose of improperly influencing the sentencing judge, there is no error in using it in connection with fixing sentence.

Id. at 28. *See also* Brill v. State, 159 Fla. 682, 32 So. 2d 607 (1947). *See generally*

The Individual's Interests

Application of the exclusionary rule to probation revocation hearings would serve to protect the individual's right to a fair hearing and guarantee due process as required under the fifth and fourteenth amendments. The Supreme Court in *Morrissey v. Brewer* recognized the need to insure these due process rights in a parole revocation situation.[33] In this regard, the Court noted that parole was a type of "conditional liberty"[34] and observed that the revocation of parole represented a "sufficiently grievous loss"[35] to entitle a parolee to certain procedural safeguards before he can be returned to prison.[36] While *Morrissey* seemed to emphasize that a parolee's status more closely resembles that of an ordinary citizen than a prisoner,[37] it noted that parole revocation changed only the type of penalty imposed on the convicted criminal. In addition, the Court recognized that a parolee may fail to be rehabilitated. Therefore, the Court did not afford the parolee "the full panoply of rights."[38] Similarly, in *Gagnon v. Scarpelli*,[39] the Court held that "a probationer, like a parolee, is entitled to a preliminary and a final revocation hearing, under the conditions specified in *Morrissey v. Brewer*."[40] The Court considered the due process right of indigent probationers and parolees to appointed counsel at these hearings. While refusing to apply a "new inflexible constitutional rule"[41] requiring counsel in all cases, the Court held that the right to counsel was mandated in at least some cases.[42]

Faulisi v. Daggett, 527 F.2d 305 (7th Cir. 1975) (court considered previous conviction); Heniman v. State, ___ Ind. App. ___, 292 N.E.2d 618 (1973) (strict rules of evidence applicable during trial no longer applicable at sentencing).

33. 408 U.S. 471 (1972). The following "minimum requirements of due process" at parole revocation hearings were set out: a) written notice of claimed violations of parole; b) disclosure to the parolee of evidence against him; c) opportunity to be heard in person and to present witnesses and documentary evidence; d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); e) a "neutral and detached" hearing body such as traditional parole board, members of which need not be judicial officers or lawyers; f) a written statement by the fact finders as to the evidence relied on and the reasons for revoking parole. *Id.* at 498-500.

34. *Id.* at 480.

35. *Id.* at 482.

36. *Id.* at 489.

37. *Id.* at 482.

38. *Id.* at 480.

39. 411 U.S. 778 (1973).

40. *Id.* at 782.

41. *Id.* at 790.

42. Justice Powell stated:

[T]he decision as to the need for counsel must be made on a case-by-case basis

Underlying the procedural protection is the probationer's substantial interest in his conditional liberty, since revocation of the probation will probably result in confinement. While the probationer has an interest in the enjoyment of the normal freedoms afforded all members of society, these interests may not be absolute. Such freedoms include the right to seek gainful employment, the right to choose and maintain one's family relationship, the right to freely associate with friends, and the right to be secure in one's person. Furthermore, the interference occasioned by illegal searches impinges on the offender's personal dignity, reputation and right to be free from arbitrary actions by the state.

In addition to the individual probationer's interest in privacy, society also has a collective concern for privacy.[43] This interest is fundamental to society's need to be free from unauthorized governmental intrusion. One method of protecting society's interest is to apply the exclusionary rule in individual cases.

The State's Interests in the Exclusionary Rule

The individual's interest in the right to privacy is qualified by the state's interest in convicting criminals. In this regard, the court must examine the effect that the exclusion of relevant and reliable, but illegally obtained evidence might have on the effective administration of the probation system. Probation is an integral part of a state's sentencing policy. Its purpose is,

> [t]o provide an individualized program offering an offender an opportunity to *rehabilitate* himself without institutional confinement under the tutelage of a probation official and under the continuing jurisdictional punishment for his original offense in the event that he abuses the opportunity.[44]

Inherent in this rehabilitative function is society's interest in the effective administration of the probation system. Effective adminis-

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in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system. Although the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings, there will remain certain cases in which fundamental fairness—the touchstone of due process—will require that the State provide at its expense counsel for indigent probationers or parolees.

Id.

43. Agnello v. United States, 269 U.S. 20 (1925). *See also* Note, *The Impeachment Exception: Decline of the Exclusionary Rule?*, 8 IND. L. REV. 865, 872 (1975).

44. Roberts v. United States, 320 U.S. 264, 272 (1943) (emphasis added).

tration requires an accurate determination as to whether the probationer has in fact been rehabilitated. Consequently, where the evidence indicates that the conditions of probation have been violated, such evidence should not be excluded because it was illegally obtained. To exclude such evidence would frustrate the purpose of the probation system and undermine the interests of society.[45]

Furthermore, society needs to be protected by preventing the commission of additional offenses.[46] A recent Illinois decision noted:

> [a] court sentencing an offender to probation takes a calculated risk that the offender's rehabilitation will progress better and that society will be adequately protected by the offender's return to the community under supervision.[47]

Obviously, the dangers inherent in this "calculated risk" fall primarily upon the public. When the probationer has in fact violated the conditions of his probation, the danger to society is no longer a possibility but a certainty. Thus, where verified factual information has shown the court's confidence to be misplaced, such evidence should not be excluded. Rather, the evidence should be admitted so that immediate steps can be taken to protect the public from the commission of additional offenses.

Moreover, strict adherence to the exclusionary rule in probation revocation proceedings may influence whether a defendant in a criminal trial is granted probation initially.[48] It has previously been noted that courts have wide discretion to decide when a defendant will be placed on probation.[49] In the exercise of this discretion, a court might reason that a particular defendant could be safely placed on probation only if all evidence of his misconduct were freely admitted. When relevant and reliable information is suppressed in a probation revocation hearing, the court may initially exact a more stringent standard of eligibility before it would grant probation. Certainly this standard should not be made more stringent than it is at present. To raise this standard would be manifestly unfair to the

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45. United States v. Rushlow, 385 F. Supp. 795 (S.D. Cal. 1974); United States v. Allen, 349 F. Supp. 749 (N.D. Cal. 1972).

46. People v. Dowery, 20 Ill. App. 3d 738, 312 N.E.2d 682 (1974).

47. *Id.* at 741, 312 N.E.2d at 685.

48. *Id. See generally* White, *The Fourth Amendment Rights of Parolees and Probationers*, 31 U. PITT. L. REV. 167, 184 (1969).

49. *See* note 1 *supra* and accompanying text.

defendant; it would also seriously interfere with the state's interest because the rehabilitative aspect of probation would be undermined.

Numerous courts have held that a probation revocation proceeding is not a formal criminal trial.[50] Consequently the offender has not been granted the full "panoply of fourth amendment rights."[51] In *Morrissey v. Brewer*,[52] the United States Supreme Court noted that a parole revocation hearing should be "flexible enough" to consider evidence including "letters, affidavits and other materials" that would be inadmissible in a criminal trial.[53] The Court also concluded that,

> given the previous conviction and the proper imposition of conditions, the State has an overwhelming interest in being able to return the individual to imprisonment *without the burden of a new adversary criminal trial* if in fact he has failed to abide by the conditions of his parole.[54]

Thus, the Court recognized that the state's interest in not equating a criminal trial with a revocation hearing needed to be protected. In *Dulin*, the probationer argued that evidence which is not admissible in an adversary criminal trial is not admissible in a probation revocation hearing.[55] However, based on *Morrissey* and numerous other cases,[56] the Indiana Court of Appeals noted that the two types of proceedings should not be equated.

The foregoing discussion shows that a probation revocation hearing is not an adversary proceeding. Probation revocation is concerned not only with protecting society, but also and most im-

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50. United States v. Bryant, 431 F.2d 425 (5th Cir. 1970). *See also* Holdren v. People, 168 Colo. 474, 452 P.2d 28, 31 (1969) ("in a proceeding to determine whether probation should be revoked the court will not be bound by strict rules of evidence"). *See generally* Brown v. Warden, 351 F.2d 564 (7th Cir. 1965). In *Brown*, the court stated,

> [i]t appears . . . that the federal constitutional rights of an accused in a criminal prosecution and the rights of an offender in a proceeding of revocation of conditional liberty under parole or probation are not coextensive.

Id. at 567. *Accord*, People v. Dowery, 20 Ill. App. 3d 733, 312 N.E.2d 682, 686 (1974).

51. Morrissey v. Brewer, 408 U.S. 471, 480 (1972).

52. *Id.*

53. *Id.* at 489.

54. *Id.* at 483 (emphasis added).

55. Dulin, 346 N.E.2d at 748.

56. Morrissey v. Brewer, 408 U.S. 471 (1972). *See also* United States v. Winsett, 518 F.2d 51 (9th Cir. 1975); United States v. Allen, 349 F. Supp. 749 (N.D. Cal. 1972); People v. Dowery, 20 Ill. App. 3d 738, 312 N.E.2d 682 (1974); State v. Thorsness, 528 P.2d 692 (Mont. 1974); Washington v. Simms, 10 Wash. App. 75, 516 P.2d 1088 (1974).

portantly, with rehabilitation of those placed in the custody of the probation system. To apply the exclusionary rule to probation revocation proceedings would obstruct the system in accomplishing its remedial purposes and frustrate the interests of the state. Therefore, if the rehabilitative function and the societal interests in the probation system are to be maintained, it is imperative that the judge who has the discretionary power to revoke probation be fully aware of all the facts and circumstances involved in an individual case.

BALANCING INTERESTS IN *Dulin*

The state's interest in prosecuting criminals conflicts with the individual's interest in privacy when evidence illegally seized is offered at a probation revocation hearing. These conflicting considerations were balanced by the *Dulin* court in noting that the additional deterrent value of applying the exclusionary rule to a probation revocation hearing is "at best, minimal."[57] Although the *Dulin* court did not explain why the additional deterrent effect is minimal, its conclusion was sound.

As noted previously,[58] the police are deterred from unconstitutional law enforcement methods by the exclusion of illegally obtained evidence at a criminal trial. Therefore, when the police have no knowledge that the defendant is a probationer, they will not be encouraged to obtain evidence in violation of the constitutional guarantee.[59] When the police are aware of the suspect's status, the deterrent effect that will be achieved by excluding the illegally obtained evidence from a probation revocation proceeding remains negligible.

> [T]he bungling police officer is not likely to be halted by the thought that his unlawful conduct will prevent the termination of probation because the authorities cannot consider the evidence he unlawfully procures.[60]

Yet, it was this additional deterrent effect which a number of dissenting opinions have sought to protect.[61] It has been argued that

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57. Dulin, 346 N.E.2d at 750, citing with approval, United States v. Allen, 349 F. Supp. 740 (N.D. Cal. 1972).

58. *See* notes 20-22 *supra* and accompanying text.

59. *In re* Martinez, 1 Cal. 3d 641, 463 P.2d 734, 83 Cal. Rptr. 382, *cert. denied*, 400 U.S. 851 (1970).

60. *Id.* at 647, 463 P.2d at 740, 83 Cal Rptr. at 389.

61. *Id.* at 649, 463 P.2d at 742, 83 Cal. Rptr. at 390. *See also* United States v. Calandra, 414 U.S. 338, 355 (1974) (Brennan, J., dissenting); United States v. Hill, 447

the exclusionary rule should be extended to probation revocation hearings because:

> [o]nce law enforcement officials are permitted to profit in any conceivable way as a direct result of unconstitutional methods of law enforcement it is to be anticipated that they will have an incentive to engage in such methods in the hope of uncovering some evidence from which they may profit.[62]

The argument that unlawful searches and seizures will proliferate "in the hope that the evidence thereby secured may be profitably used should it subsequently appear that the victim of such conduct was a [probationer]"[63] is without foundation. The odds that any given individual is a probationer are miniscule. Accordingly, no officer, no matter how enthusiastic, will consciously violate the law upon the negligible probability that the suspect is a probationer.[64]

When the deterrent value of suppressing substantive evidence at a probation revocation proceeding is minimal and the public interest weighs heavily in favor of hearing it, the exclusionary rule should not be invoked. In this regard a delicate compromise between opposing interests has been reached. As Mr. Justice Cardozo said: "On the one side is the social need that crime be repressed. On the other, the social need that the law shall not be flouted by the insolence of [the police]."[65] The solution does not lie in a strict application of mechanical rules, especially where the detriment derived from the application of such rules outweighs the benefit. Suppression of unlawfully seized evidence at the criminal trial adequately serves the deterrent function of the exclusionary rule.[66] Consequently, there is no need to apply it a second time at a probation revocation hearing.

F.2d 817, 819 (7th Cir. 1971) (Fairchild, J., dissenting); Stone v. Shea, 113 N.H. 174, 304 A.2d 647, 649 (1973) (Grimes, J., dissenting).

62. *In re* Martinez, 1 Cal. 3d 641, 649, 463 P.2d 734, 742, 83 Cal. Rptr. 382, 390, *cert. denied*, 400 U.S. 851 (1970).

63. *Id. See also* United States v. Perlman, 430 F.2d 22, 26 (7th Cir. 1970).

64. *See* Comment, *Fruit of the Poison Tree—A Plea for Relevant Criteria*, 115 U. PA. L. REV. 1136 (1967).

65. People v. Defore, 242 N.Y. 13, 17, 150 N.E. 585, 589 (1926). Cardozo, speaking within the context of an unreasonable search and seizure, balanced the need to grant the individual protection versus the possibility of a disproportionate loss of protection to society. *Id.*

66. *See* notes 20-22 *supra* and accompanying text. The major function of the exclusionary rule is deterrence. However, a second basis of the rule is the "imperative of judicial integrity." Elkins v. United States, 364 U.S. 206, 222 (1960). In *Elkins* the Court noted that the exclusionary rule must be applied in order to assure that the

Based on the above reasoning, the *Dulin* court reached the correct result. Despite the correctness of the court's ruling it failed to define police harassment adequately and thereby deprived the probationer of a means by which to measure unwarranted police activity.

Police Harassment

While the *Dulin* court noted that the only justification for extending the exclusionary rule to probation revocation proceedings would be evidence of "police harassment,"[67] it did not adequately define the term. Merely stating that evidence of such harassment will justify the extension of the rule to revocation proceedings does not provide the clarity necessary for good law. Probationers and lawyers alike must be given sufficient criteria to make an adequate determination as to whether certain police conduct will warrant applying the exclusionary rule to probation revocation proceedings. Such criteria are needed to protect the rights of the probationer and to maintain the proper balance of interests.

These interests are not adequately protected by a "sound note of warning" to the police.[68] Neither are they protected by the

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courts are not made a party to illegal searches and seizures. The exclusion of such evidence would thus maintain the "imperative of judicial integrity." *Id.* The basis of this policy consideration is found in the dissenting opinions of Justices Holmes and Brandeis in *Olmstead v. United States*, 277 U.S. 438, 469 (1927). In his dissent Justice Brandeis stated:

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law-breaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy.

Id. at 471. However, the United States Supreme Court decisions which have discussed the scope of the exclusionary rule have stressed the factual considerations of deterrence. *See* notes 22-23, 26, 32 *supra* and accompanying text. In addition, the Court in *United States v. Calandra*, expressly rejected the policy consideration of the "imperative of judicial integrity." The Court stated:

> The dissent also voices concern that today's decision will betray "the imperative of judicial integrity," sanction "illegal government conduct," and even "imperil the very foundation of our people's trust in their Government." There is no basis for this alarm.

414 U.S. 338, 355-56 n.11 (1974). Therefore, the "imperative of judicial integrity" cannot be considered a binding policy consideration which would prohibit the examination of all relevant evidence at a revocation proceeding.

67. Dulin, 346 N.E.2d at 753. *See also* United States *ex rel.* Sperling v. Fitzpatrick, 426 F.2d 1161 (2d Cir. 1970); United States v. Rushlow, 385 F. Supp. 795 (S.D. Cal. 1974).

68. Dulin, 346 N.E.2d at 753.

probationer's alternative remedy in civil or criminal court.[69] The *Dulin* court appeared to indicate that searches made for the purpose of obtaining evidence will only be unreasonable in exceptional cases. While the court implied that some searches would be unreasonable if made with undue frequency,[70] no precise limits were defined. This ambiguity leaves the probationer without the certainty of knowing when police activity will be deemed harassment.

CONCLUSION

Recognizing the need to balance opposing considerations, the *Dulin* court refused to extend the exclusionary rule to probation revocation proceedings. Noting the importance of the individual's right to be secure in his person, the *Dulin* court stated that the detriment derived from extending the rule to revocation proceedings would not justify the further encroachment upon the public interest in prosecuting criminals.

Nevertheless, the *Dulin* court did not adequately define "police harassment." While the test must be one of balance, further clarification is necessary in order to assure that the probationer's rights as guaranteed by the fourth amendment are not violated. With proper judicial definition of police harassment, the probationer's rights will be protected and the state's interest will be served.

Significant protection can be afforded released offenders simply by focusing upon the reasonableness of the search. The United States Supreme Court has stated that for fourth amendment purposes every invasion of privacy is not the same. Camara v. Municipal Court, 387 U.S. 1 (1968). In this regard a flexible standard of reasonableness has been applied to stop and frisk cases. Terry v. Ohio, 392 U.S. 1 (1968). In *Terry*, the test used to determine whether particular invasions of privacy are constitutional was whether "the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate." *Id.* at 21-22. This same flexible standard could easily be applied in a probation revocation hearing. The petitioner's status as a probationer would be a factor in determining whether probable cause did, in fact, exist. Furthermore, the probationer's status may help to substantiate facts associating him with a new violation of the same nature as the first. Additionally, the court would focus on the intent of the police officer. Where the officer's intent is to coerce, pressure or intimidate the probationer, the search cannot be considered reasonable and the evidence thereby obtained must be excluded. Conversely, where the officer's intent was to effectuate an otherwise valid search, but the search was negligently conducted the evidence should be admitted. *See generally* Amsterdam, *Perspective on the Fourth Amendment*, 58 MINN. L. REV. 128 (1974). This approach has also been considered by Judge Friendly who proposed a modified exclusionary rule which would exclude evidence obtained as a result of flagrant or intentional violations of the fourth amendment. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 952 (1965).

69. Mapp v. Ohio, 367 U.S. 643 (1961). *See generally* TASK FORCE, *supra* note 1, at 193-207. *See also* Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955).

70. Dulin, 346 N.E.2d at 753.